# Office of Chief Counsel Internal Revenue Service

# memorandum

CC:LM:CTM:LN:POSTF-164265-01 JMMarr

date: APR **3 0** 2002

Examination Division, Group to:

> Team Manager Attention:

Team Coordinator

June Y. Bass, Associate Area Counsel, LMSB from:

Joyce M. Marr, Attorney

Taxpayers: subject: Inc.

EIN:

Issue: Validity of statute extension for

Statute of Limitations:

### DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This memorandum responds to your request for assistance dated November 21, 2001. This memorandum should not be cited as precedent.

### ISSUE

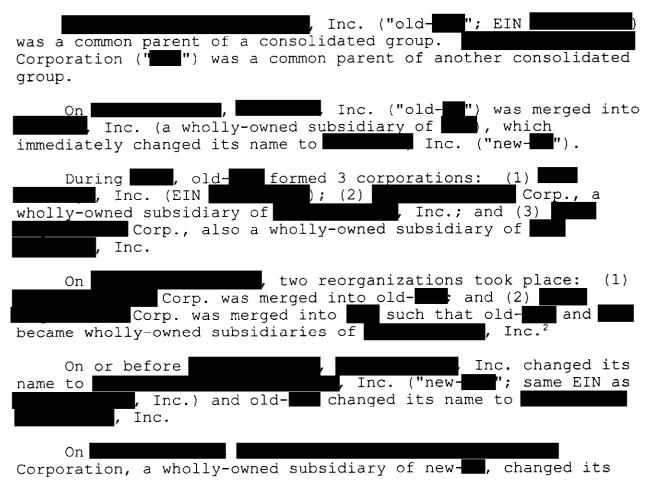
Whether a Form 872 (Consent to Extend the Time to Assess Tax) executed to extend the statute of limitations for the . Inc. consolidated group that is Inc. (EIN captioned " successor in interest to )\*" is valid for the tax year ended December 31, (EIN

## CONCLUSION/RECOMMENDATIONS

, (b)(7)a, (b)(5)(AC), (b)(5)(DP)

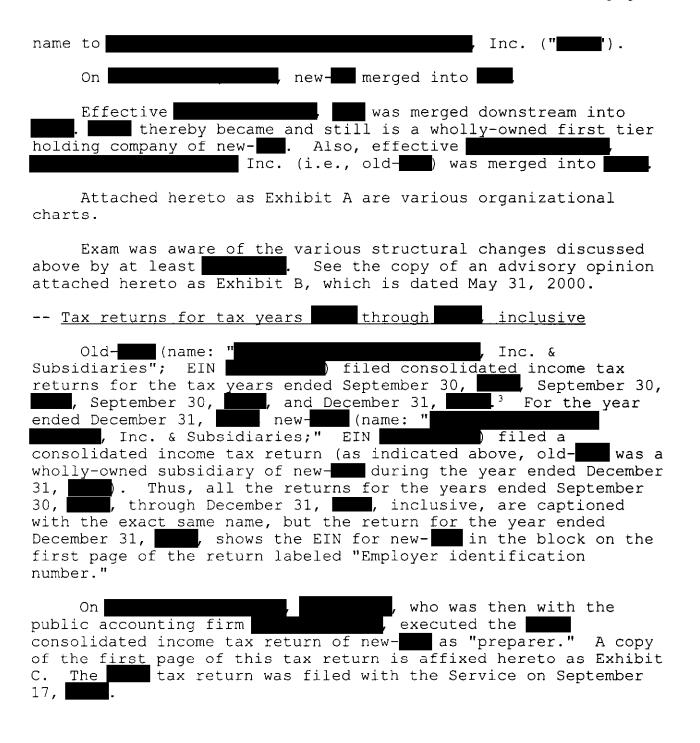
# FACTS1

# --Corporate Restructurings



The facts stated herein are based on the documents and information Exam has provided. We have not undertaken any independent investigation of the facts of this case. If the facts stated herein are incorrect or incomplete in any material respect, you should not rely on the opinions set forth in this memorandum, and should contact our office immediately.

on the respective shareholders of oldand received shares of the following of the conjunction oldwith a simultaneous merger of the composition of the conjunction oldThese reorganizations were treated as section 351(a) transactions in which the respective shareholders of transferred their stock to the conjunction of the conjunctio



The taxpayer filed a Form 1128, Application to Adopt, Change or Retain a Tax Year to change its year-end from September 30 to December 31. Permission was granted by the Service, and the taxpayer filed a short-year return for the period October 1, to December 31,

# -- Form 872 for through inclusive the Service secured a Form 872, Consent to Extend the Time to Assess Tax, captioned as " , Inc.(EIN ) successor in Inc. (EIN interest to the periods ended September 30, September 30, September 30, December 31, and December 31, The Form 872 was signed by a street, as the Vice-President of Tax for . A copy of the Form 872 is affixed hereto as Exhibit D. During a meeting held with IRS Field Counsel on IRS Exam Team Coordinator related her recollection of how the Form 872 was secured as follows. took the Form 872 to 's office for signature. When she submitted the Form 872 executed by , to then Exam Team Manager on noticed that no name had been inserted on the line in the signature block for the "Corporate Name." therefore instructed to return the Form 872 to the taxpayer for the taxpayer to insert the "Corporate Name." On , returned with the Form 872, which was executed , to the taxpayer's office where the Tax Manager for been the Vice President -- Taxes and Treasurer of new- since he left and joined the new-consolidated group. executed the Form 872 on behalf of the Service on . The administrative file contains no copies of any correspondence soliciting the Form 872. New- claims that the Form 872 secured in invalid insofar as it pertains to the tax year because of the improper caption for such year. It further claims that, accordingly, the statute of limitations for assessment expired on Taxpayer's understanding as to the years under audit When executed the Form 872 in question, he and the taxpayer were aware that the tax years under audit are those ended September 30, September 30, September 30,

<sup>4</sup> No other consents have been secured to extend the statute of limitations on assessment against the new-consolidated group for the tax year.

December 31, and December 31, as evidenced by: (1) a letter of authorization dated Vice President - Tax on new-letterhead (a copy of which is affixed hereto as Exhibit E); (2) a letter from the Tax Manager for new-letterhead, transmitting the letter of authorization (a copy of which is affixed hereto as Exhibit F); and (3) a letter dated from as Vice President of Tax on new-letterhead transmitting disclosures permitted under I.R.C. § 6662 (a copy of which is affixed hereto as Exhibit G).

# **DISCUSSION**

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. \$ 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each such subsidiary. Treas. Reg. \$ 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. \$ 1.1502-77(a).

Generally, the Service must make an assessment of tax within three years after a return is filed. I.R.C. \$ 6501(a). However, before the period for making an assessment expires, the Service and the taxpayer may consent in writing to extend the period for making an assessment. I.R.C. \$ 6501(c)(4).

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service applies the rules applicable to the execution of original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41 , 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165 , 1984-2 C.B. 305. In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other duly authorized officer.

### --Reformation

, (b)(7)a, (b)(5)(AC), (b)(5)(DP)

# , (b)(7)a, (b)(5)(AC), (b)(5)(DP)

The equitable remedy of reformation stated in <u>Woods v.</u>

<u>Commissioner</u>, 92 T.C. 776 (1989) is available to cure the defect (new common parent's name (New- not properly captioned) on the Form 872 for tax year

Reformation is an equitable remedy used to reform written contracts to reflect the real agreement between the parties when, because of mutual mistake, the writing is unambiguous but misstates the parties' intent. <u>U.S. v. Lumbermens Mutual Casualty Co.</u>, 917 F.2d 654, 658 (1st Cir. 1990); <u>Rocanville Corp. v.</u> Natural Gas Pipeline Co., 823 F.2d 92, 94 (5th Cir. 1987).

A consent to extend the period of limitations is essentially a unilateral waiver of a defense by the taxpayer and is not a contract. Stange v. United States, 282 U.S. 270 (1931); Kelley v. Commissioner, 45 F.3d 348, 350 n.4 (9th Cir. 1995); Piarulle V. Commissioner, 80 T.C. 1035, 1042 (1983). Contract principles are significant, however, because I.R.C. § 6501(c)(4) requires that the parties reach a written agreement as to the extension. Piarulle, 80 T.C. at 1042. The term "agreement" means a manifestation of mutual assent. Id. It is the objective manifestation of mutual assent as evidenced by the parties' overt acts that determines whether the parties have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

The Tax Court has the equitable power to reform a consent to conform to the parties' intention. Woods v. Commissioner, supra. In Woods, the consents contained mistakes in the taxpayer's name and EIN. The name provided on the form was "Solar Environments, Inc." rather than "Solar Equipment, Inc." and the EIN was shown as "43-1156200" rather than "43-1156196." The Tax Court permitted the document to be reformed because the incorrect language was the product of a mutual mistake. The Tax Court noted that reformation is not precluded merely because the mistake originated with the Service. The Tax Court stated that in order to reform a Form 872 there must be "clear and convincing evidence" as to the parties' intent.

The <u>Woods</u> principle cannot be extended to create authority that never existed in the first place. <u>Malone & Hyde, Inc. v.</u>

<u>Commissioner</u>, T.C. Memo. 1992-661. However, in this case, as

Treasurer of new- had the authority to act for new- to extend the statute of limitations.

, (b)(7)a, (b)(5)(AC), (b)(5)(DP)	
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# , (b)(7)a, (b)(5)(AC), (b)(5)(DP) , (b)(7)a, (b)(5)(AC), (b)(5)(DP)

Our advice has been coordinated with the Office of Chief Counsel pursuant to the NSAR pre-review procedures. If you have any questions, please contact attorney Joyce M. Marr at 949-360-2688.

### Exhibits:

Exhibit A: various organizational charts

Exhibit B: advisory opinion dated May 31, 2000

Exhibit C: 1st page of new-wee's income tax return

Exhibit D: Form 872 executed in

Exhibit E: letter of authorization

Exhibit F: letter transmitting the letter of authorization

Exhibit G: letter transmitting I.R.C. § 6662 disclosures